United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

77-7127

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-7127

TERENCE J. MOORE,

Plaintiff-Appellant,

V

ANTHONY M. SLONIM

Defendant-Appellee

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The decision herein appealed from was by Judge M. Joseph Blumenfeld of the United States District Court, District of Connecticut. His opinion is unreported.

THE ISSUES

The issues presented by this appeal are:

1. Whether the district court judge erred by making findings of fact on existing questions of fact without any prior hearing or trial on said questions of fact and without any prior admission of any factual evidence.

2. Whether the district court judge erred in treating, de facto, defendant's motion as one for summary judgment under Rule 12 (b)(6), and erred in entering his judgment, de facto, as a summary judgment under Rule 56, since matters outside the pleading were not presented to the Court under Rule 12 (b) and plaintiff was not given any opportunity to serve affidavits that genuine issues of material fact exist, under Rule 56.

3. Whether the district court judge erred in making findings on issues other than the sole issue raised by defendant's motion.

4. Whether the district court judge erred in making findings based on non-existent facts stated by the judge himself to be facts in his own ruling.

5. Whether the district court judge erred in making findings based on self-contradictory statements made by the judge himself in his own ruling.

6. Whether the district court erred in rendering a Ruling that

is ambiguous, thereby preventing anyone from knowing what the judge's findings are, thus enabling anyone to assert the Ruling as res judicata by collateral estoppel in other litigation where it would be improper and erroneous to make such assertion.

7. Whether the district court judge erred in finding that there could be no proximate cause as a matter of law.

8. Whether the district court judge erred in finding that the personal service contract was not an executory contract.

9. Whether the district court judge erred in finding that the injuries were to plaintiff's property and not personal injuries to plaintiff.

10. Whether the district court judge erred in finding that the causes of action for fraud and negligence arose out of a contract.

STATEMENT

Terence J. Moore, plaintiff-appellant, appeals from a judgment in favor of defendant-appellee, Anthony M. Slonim, entered on February 11, 1977 after a ruling on motion to dismiss was entered on February 10, 1977 granting defendant-appellee's motion to dismiss and set aside the default.

This action was brought by Terence J. Moore to recover damages for injuries first received by him beginning on June 11, 1976 when he first incurred the injury of filing bankruptcy which caused injuries of loss of reputation, loss of financial credit, a bad credit-rating, and inability to obtain credit, loss of existing personal assets, the incurrance of further debts, and emotional distress. The summons and complaint were

served on July 22, 1976. Liability was predicated on the defendant's fraud and negligence. On August 17,1976, the plaintiff filed an application for default. On August 19, 1976 the defendant filed his appearance. On August 30, 1976, thirty-six days after the defendant had been served, default was entered for the plaintiff. On September 1, 1976 the defendant filed his motion for dismissal of action and default with a supporting brief. In the motion and supporting brief the sole contention by the defendant was that the District Court lacked jurisdiction since the Bankruptcy Court had exclusive jurisdiction.

A reply memorandum of law was filed by the plaintiff on September 17, 1976 in response to defendant's motion with supporting brief. There was no oral hearing before the District Court. On February 10, 1977, approximately five months later, the District Court Judge entered his Ruling on Motion to Dismiss, which ordered that the default be set aside and defendant's Motion to Dismiss be granted. Judgment was entered on February 11, 1977 dismissing the plaintiff's Complaint.

DISCUSSION OF THE EVIDENCE

There was no evidence admitted since the defendant's motion was granted and judgment entered thereon without any hearing or admission of evidence on any genuine issue as to any material fact.

ARGUMENT

POINT I

THE DISTRICT COURT JUDGE ERRED BY MAKING FINDINGS OF FACT ON EXISTING QUESTIONS OF FACT WITHOUT ANY PRIOR HEARING OR TRIAL ON SAID QUESTIONS

OF FACT AND WITHOUT THE PRIOR ADMISSION OF ANY FACTUAL EVIDENCE.

There were various, material questions of fact that the district court judge determined in his Ruling, without having ever held any hearing or trial on these questions of fact and without the admission of any factual evidence whatsoever. Material questions of fact which were determined and found by the judge in his Ruling were (1) that plaintiff was not slandered by the defendant; (2) that the teaching contract was executed, rather than executory; (3) that all services in connection with the back wages in dispute had been performed prior to the adjudication of the bankruptcy; (4) that plaintiff - appellant suffered no injury to his reputation; (5) that plaintiff-appellant did not list his claim in his schedule of assets when filing for bankruptcy; (6) that there was no proximate cause; (7) that there was no causal connection between the fraud and plaintiff's injuries, if he suffered injury; (8) that there were no consequential damages that plaintiff incurred; (9) the point in time the cause of action for fraud arose; (10) the point in time the cause of action for negligence arose; (11) that the fraud and negligence arose out of the teaching contract; (12) that plaintiff-appellant's damages for mental distress were not exceptional, but were ordinary under the law of damages in regard to mental distress due to business fraud; (13) that the fraud involved was "business fraud" and not a personal fraud; (14) that the tort involved was a "business tort" and not a personal tort; (15) that the causes of action for fraud and negligence came into existence prior to the date when plaintiff-appellant

filed bankruptcy; (16) that the mere fact that plaintiff was misled or deceived resulted in no injury to his own reputation; (17) that the injury to plaintiff-appellant's reputation seemed extremely remote from the underlying fraud.

It is submitted that in order for the judge to reach all of the above findings he needs to know all the facts that occurred. It would be impossible to reach a determination on each of the above issues without first knowing all the facts that existed. Yet no hearing whatsoever was ever held to ascertain any facts, no evidence whatsoever was ever admitted into court, and therefore the judge had absolutely no facts whatsoever upon which he could make the above findings of fact that he made. He simply made the above findings of facts based on his own assumptions, without the assumptions even being based on any factual evidence or facts whatsoever.

Thus the judge decided the above material questions of fact and made findings of fact without having any opportunity whatsoever to be heard on the facts or to offer any factual evidence. In essence, the judge tried and decided the case on the substantive merits without having or allowing a trial, thereby denying plaintiff-appellant even the most basic due process of law.

It is black letter law and basic due process of law that if material questions of fact exist they can only be determined by the trier of fact at a trial on the substantive merits of the case. They cannot be determined by a judge prior to a trial on the substantive merits of the

case or where relevant facts are not admitted into evidence. 86 CJS 985, Lester v Preco Industries, Inc., 282 F. Supp. 459(DCNY, 1965); Hunt v Mobil Oil Corp, 410 F. Supp.10(DCNY, 1976); Oleck v Fischer, 401 F. Supp. 651 (DCNY, 1975); Owens v Housing Authority of City of Stanford, 394 F. Supp. 1267(DCConn, 1976); Rennie and Laughlin, Inc. v Chrysler Corp., 242 F. 2d 208(CACal, 1957); Butcher v United Electric Coal Co., 174 F. 2d 1003(CAI11., 1949); Snyder v. John J. Casale, Inc., 49 F. Supp. 926(DCNY,1943); Thompson v New York Central Railroad Co., 250 F. Supp. 175(DCNY, 1966); Heyman v Heyman, 356 F. Supp. 958(DCNY, 1973); Willheim v Murchison, 231 F. Supp. 142 (DCNY, 1964) affirmed 342 F.2d 33, cert denied 382 U.S. 840, and First National Bank of Arizona v Cities Service Co., 391 U.S. 253 (NY, 1968), arising out of New York.

Some examples of material questions of fact determined by the judge in his Ruling are:

1. The judge found that there was no injury to plaintiff-appellant's reputation. The determination of whether there was injury to the plaintiff's reputation is clearly a material question of fact. Endless authorities support this rule, but in particular this was the holding in Kramer v News Syndicate Co., 284 NY 557, 32 NE 2d 552 (NY); Torski v Mansfield Journal Co., 137 NE 2d 683 (1956); and Vaughn v News Leader, 105 F 2d 360 (CCAVa.).

The judge mentions that plaintiff-appellant was not precluded from pursueing a career as an attorney or as a law professor, and hence suffered no injury to reputation. While plaintiff-appellant is an attorney and law

professor, he is also a human being, and as a human being he may wish to do other things than only to be an attorney or law professor, such as he may wish to obtain mortgage financing on a house he wants to purchase, to buy a new car that needs financing, to find a better job, to obtain financing for a business venture he wants to start, and to do many other things in his life besides being only an attorney or a law professor. Because he has a bankruptcy on his record he may be denied the mortgage financing on the house he wants to purchase, he may be denied financing on the new car he wants to purchase, he may not be able to start his business venture because he is denied financing for it, he may be denied a better job, and he may not be able to do many other things simply because the bankruptcy on his record lessens his reputation. Yet the judge ignored these realities, and determined that there was no injury to plaintiff's reputation. It could only be possible for him to make that determination by examining facts and factual evidence, after a trial on the substantive merits. Yet the judge made the determination without any facts whatsoever.

2. The judge found that plaintiff had not been slandered. The determination of whether someone was slandered is a material question of fact. Lifeprinting and Publishing Co. v Field, 58 NE 2d 311 (1944) and Maas v National Casual Corp., 97 F 2d 247 (CCAMd.). Thus, whether there was defamation of character is a material question of fact. Yet the judge made this determination without any facts.

3. The judge found that plaintiff's teaching contract was executed,

since he found all duties had been performed, and found it was not an executory contract. The determination of whether a contract is executed or executory and whether there has been performance is a material question of fact. This was the holding of the United States Court of Appeals, Second Circuit, in Meyers v Selznick, 373 F. 2d 218 (CANY, 1966) which arose out of New York. It is also the holding in another case decided by the United States Court of Appeals, Second Circuit, National Utility Service, Inc. v Whirlpool Corp., 325 F. 2d 779 (CANY, 1963) which also arose out of New York. See also National Committee of Gilbran v Gilbran et al, 381 F 2d 607 (1967),and Bartsch v Metro Goldwyn-Mayer, Inc., 370 F. Supp. 899 (1967).

The only possible way the judge could determine that the contract had been fully performed or partially performed or whether there was anything left to be performed, or would be to examine facts and factual evidence. How could the judge determine anything about performance under the contract without looking to facts and factual evidence? He could not. He would have to look to the factual evidence and the facts. Yet the judge made the determination without any facts whatsoever.

4. The judge found that the causes of action for fraud and negligence arose prior to the date of the filing of plaintiff-appellant's bankruptcy petition. The determination of when the cause of action arose, in point of time, is a material question of fact. The United States Court of Appeals, Second Circuit rendered such holding in Sherbourne Corp. v Hoar, 456 F. 2d 1269 (CAVt.1972) in a case arising out of Vermont. Yet the judge made

the determination without any facts whatsoever.

5. The judge found that there was no proximate cause. The determination of whether there was proximate cause is thoroughly established to be a material question of fact. This is the well established rule in the Second Circuit of the United States Court of Appeals and was the holding in Schweitzer v Gilmore, 251 F 2d 171 (CAConn.,1958) arising out of Connecticut, and in Rosillo v Erie Railroad Co., 239 F 2d 760 (CANY 1957), Liberatore v National Cylinder Gas Co., 193 F 2d 429 (CANY, 1952), and Jorgensen v York Ice Machinery Co., 160 F 2d 432 (CANY,1947), cert. denied 332 US 764, all of which arose out of New York. See Riggs v Pursell, 74 NY 370 (1878). See also the Connecticut case Kildeff v Kalinowski, 136 Conn. 405, 71 A 2d 593. 86 CJS 985, Section 61 states: "Under general rules, in an action for tort the question of whether defendant's wrongful act was or was not the or a proximate cause of the injury is ordinarily one for the jury."

6. The judge found that there was no causal connection between the fraud and the plaintiff's injuries, and also found that the mere fact that the plaintiff was misled or deceived resulted in no injury to his own reputation. The judge further found that the injury to plaintiff-appellant's reputation seemed extremely remote from the underlying fraud. The determination of whether there was a causal connection between the fraud and the resulting injury is firmly established as a material question of fact, or in other words, the determination of whether there was causation between the wrongful act and the injury, and the degree of that causation

is a material question of fact. This was what the United States Court of Appeals, Second Circuit, held in Ritchie v Landau, 475 F 2d 151 (CANY 1973) arising out of New York. See also the Connecticut cases of Dunn v Finley, 151 Conn. 618, 201 A 2d 190; Varley v Motyl, 139 Conn. 128, 90 A 2d 869; and Quackenbush v Vallario, 114 Conn. 652, 159 A 893. In addition, 25A CJS 174 states; "Whether plaintiff's injuries or damages were caused by, or were the natural and proximate consequences of defendant's wrongful act is ordinarily a question of fact."

It would be impossible for the judge to determine that there was no causation between the fraud and plaintiff's injuries, or that "the injury to plaintiff's reputation is extremely remote from the underlying fraud" unless the judge knew the facts and examined the factual evidence. How could he possibly determine whether there was causation or how direct or remote the causation between the fraud and the injury was unless he had already examined the facts and factual evidence? He could not possibly make such determination unless he had examined facts and factual evidence. Yet the judge made such determinations without any facts whatsoever.

7. The judge found that there were no consequential damages that plaintiff-appellant incurred. The determination of whether consequential damages were incurred is a material question of fact. This is the well established rule in federal cases in New York and Connecticut and the holding in Bonime v Doyle, 416 F Supp 1372 (DCNY,1976); Applied Data Processing v Burroughs Corp., 394 F Supp 504 (DCConn. 1975); Chris-Craft Industries Inc v Piper Aircraft Corp., 384 F Supp 507 (DCNY,1974).

Further, it is well established that the determination of whether the plaintiff suffered injury or incurred damages and if so, the amount of injury or damages, are material questions of fact. 37 CJS 495, wherein it is stated: "The amount of the loss which the plaintiff has suffered by reason of fraud is ordinarily a question for the jury." 25A CJS 159 et seq states:

> "Determination of the question of damages is primarily for the jury or other trier of the facts...the estimation or determination of the amount of the injury or damages sustained is usually a question of fact for the jury...Questions of whether plaintiff has sustained an injury or any damage, and, if he has, the nature and extent thereof, are.... questions of fact....The question of the permanancy and future consequences of the injury....is ordinarily for the determination of the jury."

See also Varley v Motyl, 139 Conn. 128; Freeman v Manhattan Cab Corp., 150 NY S 2d 674; Slabinski v Dix, 138 Conn. 625; Wigand v Bachmann-Bechtel Brewing Co., 222 NY 272; and Wolfe v General Mills Inc., 231 NY S 2d 918. Yet the judge made determinations that there was no injury or damages, without any facts.

The judge found that the causes of action arose out of the teaching contract. The determination of whether actions arise out of a contract is a material question of fact. Asher v Reliance Insurance Co., 308 F. Supp 847 (DCCal.,1970); United States Hoffman Machinery Corporation v Ebenstein, 96 P 2d 661; County Plains Corp. v Nosband Corp., 256 NY S 10. The judge could not possibly make a determination on this without looking at facts. Yet the judge made the determination without any facts whatsoever.

It is submitted that the district court judge erred in finding and determining the above-mentioned material questions of fact without any prior hearing or trial on said questions of fact and without any prior admission of factual evidence, which is a denial of basic due process of law. The judge, in reality, tried and decided the case on the substantive merits without having any hearing or trial on the substantive merits or affording plaintiff-appellant an opportunity to present factual evidence to the Court.

POINT II

THE DISTRICT COURT JUDGE ERRED IN TREATING, DE FACTO, DEFENDANT'S MOTION AS ONE FOR SUMMARY JUDGMENT UNDER RULE 12 (b)(6),AND ERRED IN ENTERING HIS JUDGMENT, DE FACTO, AS A SUMMARY JUDGMENT UNDER RULE 56, SINCE MATTERS OUTSIDE THE PLEADING WERE NOT PRESENTED TO THE COURT UNDER RULE 12 (b) AND PLAINTIFF WAS NOT GIVEN ANY OPPORTUNITY TO SERVE AFFIDAVITS THAT GENUINE ISSUES OF MATERIAL FACT EXIST, UNDER RULE 56.

The sole issue that defendant-appellee's motion raised was whether the plaintiff-appellant was the proper party to sue for fraud and negligence while plaintiff's bankruptcy proceeding was still pending and was not yet closed. Yet the judge, in his Ruling, made determinations from the motion.

It is contended that the judge, in reality, treated the motion to dismiss as a motion for a summary judgment, and thus his Ruling and the Judgment thereon is, in reality, a Summary Judgment.

The judge achieved this result by first holding in his Ruling that "Moore is not the proper party to bring this action." on page (3) of his

Ruling. This determined that defendant's motion was based, in the judge's view, on the defense as stated in Rule (b) (6), namely, failure to state a claim upon which relief can be granted. This finding by the judge thus brought defendant's motion and the judge's Ruling within the purview of Rule 12 (b) and made Rule 12(b) applicable to the defendant's motion and the judge's Ruling.

Rule 12 (b) also states that:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."(emphasis added)

There was no matter outside the plaintiff's pleading that was presented to the Court, as seen in the Record. Therefore, the motion to dismiss could not be treated as one for summary judgment. Therefore, the judge erred in treating said motion to dismiss, de facto, as a motion for summary judgment.

Further, assuming solely for the sake of argument, that the motion to dismiss could be treated as a motion for summary judgment, it would then have to conform to the provisions of Rule 56, and pursuant to Rule 12(b) the plaintiff must have been given a reasonable opportunity to present material made pertinent to a summary judgment.

The pertinent portions of Rule 56 state:

> "Rule 56 SUMMARY JUDGMENT
> ....(c) Motion and Proceedings Thereon.....
> The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be

> rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...."

The plaintiff never was given any opportunity whatsoever to present material that would be pertinent to defendant's motion if the judge was going to treat the motion as one for summary judgment. When the judge decided to treat the motion as a motion for summary judgment he was required to give notice to the plaintiff that he was doing so, and had to give the plaintiff an opportunity to present material, including affidavits, to the Court that genuine issues of material fact existed.

A case that is on point in holding that the judge must give the adverse party notice that the judge is treating the motion to dismiss as one for summary judgment and then give the adverse party an opportunity to present materials, including affidavits, indicating that there are genuine issues of material fact, is the case of Costen v Pauline's Sportswear, Inc., 391 F 2d 81 (CACal.,1968) in which the Court held:

> "If the district court on the motion to dismiss intends to consider matters outside the pleadings, the opposing party should be given some notice to afford the opportunity to furnish the court with relevant material in support of his own position." (emphasis added)

Another case that further supports this rule is the case of Jackson v University of Pittsburgh, 405 F Supp 607(DCPa.1975) supports the rule that if the judge is going to treat a motion to dismiss as a motion for summary judgment he must give the plaintiff notice thereof so the plaintiff can have an opportunity to present materials indicating that there are material questions of fact to be determined. The Court held that

"Where the plaintiff was not apprised of the possible transformation of the defendant's motion to dismiss into a motion for summary judgment, and thus was offered no opportunity to respond, the court could not consider the motion to dismiss as a motion for summary judgment."

Another case that further supports this rule is Sims v Mercy Hospital of Monroe, 451 F 2d 171 (CAMich.,1971) where the Court held that where the district court considered matters outside the complaint on a motion to dismiss for failure to state a claim, the plaintiff should have been given notice and afforded an opportunity to present material pertinent to the motion.

Further, in Albers v Wilson and Co., 184 F Supp. 812 (DCMinn.1960) the Court held that the field to be explored on a motion for dismissal is a narrow one, and the burden of establishing the nonexistence of any genuine fact issue is upon the moving party against whom all doubts must be resolved.

The plaintiff-appellant never received any notice by the Court that it was going to or was treating the defendant's motion to dismiss as a motion for summary judgment. Therefore, the plaintiff-appellant never had any opportunity to present material in support of his own position, and never had any opportunity to present material including affidavits, to indicate that there were genuine issues of material fact that existed in the case. The plaintiff could not have possibly known that the judge was going to treat or was treating the motion to dismiss as one for summary judgment unless the judge gave him notice thereof. Yet the judge never gave any such notice whatsoever to the plaintiff.

The first point at which the plaintiff could possibly have known that the judge was treating defendant's motion to dismiss as a motion for summary judgment was when the plaintiff received the judge's Ruling On the Motion to Dismiss in the United States Mail. By that time plaintiff could not possibly present any material that genuine issues of material fact existed since the judge had already issued the Ruling on the matter.

In essence, the judge treated defendant's motion to dismiss as a motion for summary judgment under Rule 12(b)(6) and Rule 56, but in doing so violated these Rules by not giving the plaintiff any notice that he was treating the motion as one for summary judgment and by not giving the plaintiff any opportunity to present material, including affidavits, which indicated that genuine issues of material fact did exist. Thus, the Court erred, and denied the plaintiff basic due process of law by denying him adequate notice and an opportunity to be heard on the issue of whether there were material questions of fact that existed.

Further, defendant's motion to dismiss could not even be treated by the judge as a motion for summary judgment at all since no matters outside the pleading were presented to the Court, as required by Rule 12(b).

It is stated in Rule 12(b) that matters outside the pleading must be presented to the Court before a motion to dismiss can be treated as a motion for summary judgment. It is a firmly established rule of law that matters contained in defendant's motion to dismiss itself or matters contained in defendant's brief in support of his motion are not "matters outside the pleading", and hence do not comply with said requirement of Rule 12(b).

A case supporting this rule is Harry Winston, Inc. v Waldfogel, 292 F Supp 473 (DCNY,1968) in which the Court held that briefs, unlike uncontroverted portions of affidavits, were not sources of evidence which the court could consider on a motion to dismiss. Further, in Trinsey v Pagliaro, 229 F Supp 647 (DCPa.,1964) the Court held: "Statements of counsel in their briefs or arguments are not sufficient for purposes of granting a motion to dismiss or for summary judgment."

In Fitchette v Collins, 402 F Supp 147 (DCMd.1975) the Court clearly stated that where the defendant's version of the incident, though stated in his motion to dismiss and brief was not supported by affidavit or other relevant materials, it could not be considered by the Court under Rule 12(b) or Rule 56 for purposes of a motion to dismiss or for summary judgment. Likewise in Nix v Fulton Lodge No. 2 of International Association of Machinests and Aerospace Workers, 452 F 2d 794, cert denied 406 US 946 (CAGa.,1971) the Court held that other opinions of the Court and the memorandum of law submitted by the defendant to the Court in support of its motion to dismiss for failure to state a claim did not constitute matters outside the pleading sufficient to transform the motion to dismiss into a motion for summary judgment under Rule 12(b). (emphasis added)

Thus it is a well established rule of law that a defendant's mere motion to dismiss and the brief in support of the motion are not "matters outside the pleading"under Rule 12(b) and hence are not sufficient to allow the Court to transform the motion to dismiss into a motion for summary judgment. Something more is needed, such as affidavits. In the case-at-bar the only materials presented to the District Court by the defendant was the defendant's

motion to dismiss and his brief in support of the motion. He presented no other materials whatsoever. By the above established rule of law, defendant's motion to dismiss and his brief in support thereof were not "matters outside the pleading"under Rule 12(b). Thus there were no matters outside the pleading presented to the District Court, as required by Rule 12 (b), and therefore the District Court, by Rule 12(b), could not transform or treat the defendant's motion to dismiss as a motion for summary judgment. Accordingly, the judge erred in even treating the defendant's motion to dismiss as a motion for summary judgment in the beginning or at any time. The judge was required to treat the motion as a motion to dismiss only.

POINT III

THE DISTRICT COURT JUDGE ERRED IN MAKING FINDINGS ON ISSUES OTHER THAN THE SOLE ISSUE RAISED BY DEFENDANT'S MOTION TO DISMISS

The sole issue raised by the defendant's motion to dismiss was that the Bankruptcy Court had exclusive jurisdiction over the matter while the bankruptcy proceeding was pending since the plaintiff was the improper party to bring the action while the bankruptcy was still pending.

It is contended that the district court judge erred in making findings on issues other than the above sole issue raised by the defendant's motion to dismiss, since only issues raised by the moving party's motion can be determined by the Court on a motion to dismiss.

Schwartz v Com.Land Title Insurance Co., 374 F Supp 564 supplemented 384 F Supp 302(DCPa.1974) supports the above contention. In the Schwartz

case the Court held that in a ruling on a motion to dismiss for failure to state a claim the court may not consider matters outside the pleading; if matter outside the pleading is to be considered the matter must be treated as a motion for summary judgment. See also Thompson v New York Central Railroad Co., 250 F Supp 175 (DCNY,1966) where the Court held that whether the plaintiffs can substantiate the issues in their complaint is not for determination on a motion to dismiss.

In another case that is particularly applicable, Schy v Susquehanna Corp., 419 F 2d 1112, cert. denied, 400 US 826 (CAI11. 1970) the defendants had not mentioned the issue of damages at all in their motion to dismiss. However,the district court decided the issue of damages anyway. The United States Court of Appeals, Seventh Circuit held that the decision on the issue of damages by the district court was improper, and also held that issues not mentioned by the defendant's motion to dismiss could not be determined by the district court within the purview of rendering a decision on the motion to dismiss.

Further, the case of Schumaker v Sommer, 386 F Supp 618, affirmed 518 F 2d 653 (DCS.D.,1974)supports the contention that the Court cannot make findings on other than the issue or issues mentioned in defendant's motion to dismiss. The Court held that "A determination requiring close scrutiny of factual details is not appropriately decided on a motion to dismiss."

In a federal case arising out of New York, Murphy v Bankers Commercial Corp., 111 F Supp 608 (DCNY,1953) the Court said that "Complex questions should not be disposed of by motion under the Federal Rule to Dismiss a cause

of action or for a summary judgment thereon."

In Trinsey v Paglia , 229 F Supp 647 (DCPa,1964) the Court held that "Statements of counsel in their briefs or arguments are not sufficient for the purposes of granting a motion to dismiss or for a summary judgment."

Other cases further clearly establish that a court cannot determine issues on a motion to dismiss unless the issues are contained in the defendant'smotion to dismiss. In Rozelle v Quinn, 47 F Supp 740 (DCCal.1948) the Court held that a motion to dismiss is limited to allegations of the motion, and reasons advanced in support thereof based on facts not appearing therefrom must be disregarded. See also Massachusetts Bonding and Insurance Co. v Darby, 59 F Supp. 175 (DCMo.1945) and Albers v Wilson and Co., 184 F Supp. 812 (DCMinn.1960).

The sole issue raised by the defendant's motion to dismiss was whether the District Court had jurisdiction since, at least according to defendant's allegation, the plaintiff was the improper party to bring the action while plaintiff's bankruptcy was or is still pending. Accordingly, and pursuant to the above authorities, this was the sole issue upon which the judge could make a finding or determination, since defendant's motion was a motion to dismiss.

Thus it is contended that the district court judge erred in making findings or determinations on issues other than the sole issue raised by defendant's motion to dismiss.

POINT IV

THE DISTRICT COURT JUDGE ERRED IN MAKING FINDINGS BASED ON NONEXISTENT FACTS STATED BY THE JUDGE HIMSELF TO BE FACTS IN HIS OWN RULING

The judge, in his Ruling, makes several statements that he considers facts, when, in reality, the statements are not true and are a statement of facts that never existed.

First, on the first page (pg.1) of his Ruling the judge states that "It is undisputed that plaintiff did not list the instant claim in his schedule of assets when filing for bankruptcy." This is not true. The plaintiff testifiedunder oath at the first hearing on July 6, 1976 that he had a claim against Wethersfield School of Law, Inc. for unpaid back salary for $10,905.00. Further, on July 21, 1976 the plaintiff filed an amendment to his bankruptcy petition, listing the claim. Appended hereto and hereby made a part of this Appellant's Brief is an affidavit executed by the plaintiff, Terence J. Moore, which contains a true and correct copy of said amendment to plaintiff's bankruptcy petition.

Further, since the judge in his Ruling determines that the actions for fraud and negligence are really simply part of the claim for unpaid salary due to breach of contract and not separate causes of action from the claim for back unpaid salary and breach of contract the only conclusion that can be made is that since the judge determined that the actions for fraud and negligence were simply part of the action for breach of contract, said actions were listed by plaintiff in his schedule of assets since the plaintiff listed his claim based on an action for breach of contract in his schedule of assets. Thus, the judge erred in stating as a fact that "It is undisputed that plaintiff did not list the instant claim in his schedule of assets when filing for bankruptcy,"on page one of his Ruling, footnote one (1).

Second, the judge, on page one (1) of his Ruling, states that plaintiff is "alleging that as a result of defendant's representation and negligence, plaintiff was induced to execute a contract deferring payment of certain back wages for a period of five years." This conclusion by the judge is erroneous and is factually not what the plaintiff has alleged in his complaint. The plaintiff alleges in his complaint that after the $10,905 in unpaid back salary was due and owing the defendant used fraud and negligence to evade the plaintiff's demands for payment, and thereby forced the plaintiff to file bankruptcy. Thus, the judge erred in misinterpreting plaintiff's allegations in his complaint and then concluding in his Ruling that his misinterpretation was the factual allegation made by plaintiff.

Third, on page two (2) of the judge's Ruling he states: "The defendant is alleged to have committed a business tort." Plaintiff has no such allegation anywhere in his complaint. It is factually untrue that plaintiff made any such allegation. Plaintiff's complaint has absolutely no allegation that any tort was a "business tort." That is a conclusion of the judge, not any allegation made by the plaintiff. Thus, it is factually not true that plaintiff ever alleged that defendant committed a "business tort." On the contrary, plaintiff alleges that the defendant has committed personal torts. Thus, the judge erred in stating that the plaintiff alleges that the defendant "committed a business tort."

Fourth, on page three (3) of the judge's Ruling, in footnote two (2) the judge states that "Since all services in connection with the back wages in dispute had been performed prior to the adjudication of bankruptcy..."

This statement by the judge is a finding and determination of a material question of fact. The statement by the judge is a finding and determination of a material question of fact. The statement by the judge is also objectively false, not true, and erroneous. The plaintiff, as a matter of objective fact, had not graded any of the final examination papers, and had not and has not turned in any final grades to Wethersfield School of Law, Inc. which he has a duty to perform. Plaintiff still had to perform these duties. Thus, all services in connection with the back wages in dispute have not been performed prior to the adjudication of bankruptcy. Appended hereto and hereby made a part of this Brief is an Affidavit which states that plaintiff had not fully performed all services in connection with the back wages in dispute. Thus, the judge erred in stating in his Ruling his afore-mentioned statement since said statement is objectively not true and erroneous. Further, by making said statement the judge decided a material question of fact without any hearing on the facts or any factual evidence having been presented to the Court, nor the plaintiff having any opportunity to present materials to the Court that indeed showed there was a material question of fact as to whether the plaintiff had fully performed all services in connection with the back wages in dispute.

Fifth, the judge, on page five (5) of his Ruling, makes the following statements of factual conclusion: "Plaintiff, however, voluntarily chose not to list this claim as an asset"and then "Because plaintiff did not list this chose in action as an asset of his estate..." Again, by these statements the judge makes findings of fact on material questions of fact.

Further, the said statements by the judge are actually not true and are erroneous. As pointed out earlier, plaintiff did in fact list his claim for back wages, based on breach of contract, in his schedule of assets in his bankruptcy petition. The aforesaid affidavit clearly establishes this. The judge concludes in his own Ruling that the actions for fraud and negligence are really part of plaintiff's claim or chose in action for back wages. Indeed, on page five (5) of his Ruling the judge does exactly this by stating: "[illegible] filed for bankruptcy in June, 1976, plaintiff possessed a cause of action against the defendant. This cause of action might be expressed as either a contractual claim for back wages and recission of the prior deferrment or as a suit in fraud." This statement by the judge clearly demonstrates that the judge views the claim for back wages and the claims based on fraud and negligence as merely one chose in action. If that is so, and since the claim for back wages is listed in the plaintiff's schedule of assets in his bankruptcy petition, the judge's statements that "Plaintiff chose not to list this claim as an asset"and "Because plaintiff did not list this chose in action as an asset of his estate"are objectively, factually not true, false and erroneous. The judge therefore erred in asserting said statements as facts and factual conclusions, since said statements are not factually true.

Further, said statements by the judge constitute findings and determinations of material questions of fact.

POINT V

THE DISTRICT COURT JUDGE ERRED IN MAKING FINDINGS BASED ON SELF-CONTRADICTORY STATEMENTS MADE BY THE JUDGE HIMSELF IN HIS OWN RULING

The judge makes self-contradictory statements in his Ruling and then reaches a different finding on each contradictory statement.

On page five (5), lines 1-6, of his Ruling the judge states:

> "When he filed for bankruptcy in June, 1976, plaintiff possessed a cause of action against the defendant. This cause of action might be expressed as either a contractual claim for back wages and recission of the prior deferment or as a suit in fraud. In either case, the chose in action was property of the estate."

It is clear from the above statement by the judge that the judge considers the claim for back wages based on breach of contract and the claim based on fraud and negligence to be simply one chose in action. It is clear that he feels that this one chose in action could either be expressed through a contract suit or a tort suit. But no matter which way it is expressed, the judge, by his above-quoted language, considers it to be only one chose in action. It has also been established above, both by statement and appended affidavit, that the plaintiff did in fact list his claim for back wages in his Schedule of Assets in his bankruptcy petition. Since the claim for back wages, by the judge's own above-quoted statement, is merely one way to express the one existing chose in action, then, by common logic and reasoning, the chose in action, including its expression as a claim based on fraud and negligence, is listed in the plaintiff's Schedule of Assets in his bankruptcy petition.

But the judge, by his own statements in other parts of his Ruling, directly contradicts the above and his own above-quoted statements on page five (5) of his Ruling. On page one (1) of his Ruling the judge states in footnote one (1); "It is undisputed that plaintiff did not list the instant claim

in his schedule of assets when filing for bankruptcy." Further, on page five (5) of his Ruling, the judge states: "Plaintiff, however chose not to list this claim as an asset"and further: Because plaintiff did not list this chose in action as an asset of his estate..."

These statements are directly contradictory to his above-quoted statements at lines 1-6 on page five (5) of his own Ruling.

The judge has thus made self-contradictory statements in his own Ruling. He then makes crucial findings and determinations based on these self-contradictory statements. He cannot, at one point, conclude that the claim for back wages and the claim based on fraud and negligence are merely different expressions of one chose in action, thereby necessarily resulting in the conclusion that the fraud and negligence merely arose out of the contract, as he concludes on page two (2) of his Ruling, resulting in the plaintiff having no cause of action for fraud and negligence, and then, at another point, and in direct contradiction, conclude that the cause of action for fraud and negligence is a separate claim not arising out of any contract and state that this separate claim for fraud and negligence was not listed in the plaintiff's schedule of assets in his bankruptcy petition, as he does in footnote one (1) on page one (1) and also on page five (5) of his Ruling. Thus, his statements in this regard are directly self-contradictory, and the different conclusions he reaches based on his self-contradictory statements,are likewise self-contradictory conclusions in his Ruling.

Therefore, the judge's findings and determinations based on the above-mentioned self-contradictory statements and resulting self-contradictory

conclusions, are erroneous and invalid.

POINT VI

THE DISTRICT COURT JUDGE ERRED IN RENDERING A RULING THAT IS AMBIGUOUS, THEREBY PREVENTING ANYONE FROM KNOWING WHAT THE JUDGE'S FINDINGS ARE, THUS ENABLING ANYONE TO ASSERT THE RULING AS RES JUDICATA BY COLLATERAL ESTOPPEL IN OTHER LITIGATION WHERE IT WOULD BE IMPROPER AND ERRONEOUS TO MAKE SUCH ASSERTION.

When one reads the district court judge's Ruling as a whole it is extremely difficult to ascertain just what is a finding, what is a mere statement, what is a conclusion, what is an inference and not a conclusion, what is a grounds or reason for a finding, what is reasoning, and what would be res judicata as contrasted to what would not be res judicata. The judge in his Ruling, directly contradicts himself, as argued above, and also makes findings based on nonexistent or erroneous facts as argued above. In essence, the Ruling is so ambiguous that it is difficult for any person to know what would be res judicata and what would not be res judicata. Certainly, reasonable men could reach different conclusions and inferences as to the meaning and effect of various parts of the Ruling. This being the situation it is contended that the Ruling or any part thereof can be used by anyone to argue that any issue in other litigation involving the plaintiff is res judicata, by collateral estoppel, since that issue was determined in the Ruling in the case-at-bar. Since the Ruling is so ambiguous the plaintiff would have great difficulty proving otherwise. Since this is the situation due to the ambiguity of the Ruling, the judge erred in issuing the Ruling in its ambiguous form, thereby preventing reasonable

men from knowing what matters in the Ruling would be res judicata and what matters are mere inferences, or statements, and not res judicata. Due to the above, the Ruling denies the plaintiff due process of law in that the plaintiff, in opposition to an argument that a part of the Ruling is res judicata by collateral estoppel in other litigation would not be able to determine what is res judicata and what is not res judicata, thereby being unable to oppose any argument that a part of the Ruling is res judicata by collateral estoppel in other litigation involving the plaintiff.

In Stonehill v Security National Bank, 68 F.R.D. 24 (DCNY,1975) the Court held that even if the evidentiary facts are undisputed, summary judgment must be denied if inferences drawn from the facts are disputed. The same rule was held to be applicable by the Court in Beckman v Walter Kidde and Co., 316 F Supp 1321 (DCNY,1970), affirmed 408 US 922. In Crystal City v Del Monte Corp., 463 F 2d 976 (CATex.,1972), cert. denied 409 US 1023, the Court found that summary judgment is proper only when the truth is clear, when the basic facts are undisputed, and when the parties are not in agreement regarding material factual inferences that may be properly drawn from such facts. See also in Sinderman v Perry, 430 F 2d 939, (CATex.1970), cert. granted 403 US 917, affirmed 408 US 593. In Minnis v UAW, 531 F 2d 850 (CAMo.,1975) the Court held that a case may be taken from the jury only when there is no genuine issue of material fact, and an evaluative judgment between two rationally possible conclusions from the facts cannot be engaged in on summary judgment. Finally, in Fitzsimmons v Best, 528 F 2d 692(CAIll.,1976) the Court stated that on a motion for summary judgment,

for the purpose of determining whether any material fact remain disputed, inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion.

If the district court judge was going to grant the defendant's motion to dismiss it should have granted it on the sole issue raised in defendant's motion - that the Court lacked jurisidiction since the plaintiff was the improper party to sue while the bankruptcy proceeding was still pending, and should not have discussed all other issues. Further, since reasonable men could reach different conclusions as to the meaning and effect of various parts of the Ruling, the Ruling is ambiguous and hence constitutes reversible error.

POINT VII

THE DISTRICT COURT ERRED IN FINDING THERE COULD BE NO PROXIMATE CAUSE AS A MATTER OF LAW.

It has already been contended that the issue of whether there was proximate cause is a material question of fact. However, the judge in his Ruling, on pages four (4) and five (5) states that the fraud or negligence could not have been a proximate cause of plaintiff's injuries, as a matter of law and logic. However, the Judge bases this determination on his own prior findings on several material questions of fact and on non-existent facts stated to be in existence.

First, on page five (5) of his Ruling he raises the material question of fact of whether the chose in action was property of the estate. He finds "In either case, the chose in action was property of

the estate.", thereby determining this material question of fact. He erred in making said finding.

Second, on page five (5) he states: "Plaintiff, however, voluntarily chose not to list this claim as an asset." This is simply factually not true since the plaintiff did list his claim as an asset in his bankruptcy, as has been stated previously and as shown by the appended affidavit. Thus the above quoted statement by the judge is not true and erroneous. Further, the issue it raises is a material question of fact, and hence the judge erred in determining the factual issue by making the above-quoted statement.

Third, on page five (5) he states: "If, on the other hand, plaintiff's debts would have exceeded his assets even with the addition of the claim for back wages,..." The determination of whether plaintiff's debts would have exceeded his assets even with the addition of the claim for back wages is clearly a material question of fact. Thus, the judge's ultimate finding that there was no proximate cause as a matter of law would first require a determination of this material question of fact.

The judge, therefore, made his finding that there could be no proximate cause as a matter of law by basing said finding on his prior determinations of the above-mentioned material questions of fact and on "facts" that are in reality not true and nonexistent. In terms of logic, his major premise is based on erroneous minor premises, thereby resulting ultimately in reaching the wrong conclusion. Therefore his reasoning to his ultimate finding is false in that it is based or premised on prior

erroneous conclusions. His ultimate finding that the fraud or negligence could not have been the proximate cause of plaintiff's injuries is based and premised upon his prior findings on material questions of fact and on"facts"that are not true and nonexistent. Since he could not make said findings on said material questions of fact and since said other "facts"were not true and nonexistent, his ultimate finding that there could not be any proximate cause as a matter of fact and logic was false and erroneous. The judge therefore erred in rendering said finding of no proximate cause as a matter of law.

POINT VIII

THE DISTRICT COURT JUDGE ERRED IN FINDING THAT THE PERSONAL SERVICE CONTRACT WAS NOT AN EXECUTORY CONTRACT.

On page three (3) of the judge's Ruling in footnote two (2), the judge states:

> "Since all services in connection with the back wages in dispute had been performed prior to the adjudication of bankruptcy, plaintiff's citation of cases dealing with executory personal service contracts is inapposite."

This statement by the judge is clearly a finding or determination of a material question of fact. Certainly the question of whether all services in connection with the back wages in dispute had been performed prior to the adjudication of bankruptcy is a material question of fact that could only possibly be determined by examining the relevant facts and factual evidence. No one could possibly determine that all services had been performed unless he examined facts and factual evidence per-

In State v Associated Packing Co., 192 NW 267, 195 Iowa 1318 the Court held:

> "A contract becomes executed only when it has been performed according to its terms; until this has been accomplished it is executory."

See also Leadbetter v Hawley, 117 P 289, 59 Ore. 422; Mather v Mather, 154 P 2d 684, 25 Cal 2d 582: Realty Corp. of America v Burton, 327 P 2d 948, 162 CA 2d 44; Cassella v Tiberio, 80 NE 2d 426; M.B. Kahn Construction Co. v Crain, 71 SE 2d 503,222 SC 17.

In Klein Norton Co. v Cohen, 290 P 613, 107 CA 325 the Court stated that "It has been held that an agreement, in order to be executed, must be fully performed on both sides.

In Pratt Laboratories, Inc. v Teague, 160 F Supp. 176(DCArk.,1958) the Court held that "An executed contract is one where whatever is contracted to be done on either hand has been done."

The Court, in E.C. Artman Lumber Co. v Bogard, 230 SW 953,191 Ky. 392, held that "An executed contract arises when a thing contracted for is performed; nothing of the bargain remaining but its consequences."

Further, in a 1974 case decided by the Court of Appeals in Texas, In re American Magnesium Co., 488 F 2d 147 (CATex.,1974) the Court held that an"executory contract"is one in which a party binds himself to do or not to do a particular thing, whereas an "executed contract"is one in which the object of the agreement is already performed.

Likewise, 17 Am Jur 2d 341 states: "An executory contract is one in which a party binds himself to do or not to do a particular thing, whereas an executed contract is one in which the object of the agreement is

taining thereto. Yet, as pointed out previously, the judge rendered such finding or determination without examining any facts or factual evidence whatsoever, and without giving the plaintiff any notice or any opportunity at all to present factual evidence. The judge thus erred in rendering said finding and determination on said material question of fact.

Further, in objective reality and truth, the actual and true fact is that the plaintiff had not performed and has never performed all services in connection with the back wages in dispute. The plaintiff had not read and graded the final examinations in the courses he taught at Wethersfield School of Law, Inc. and had not and has never turned in said final grades to said School. These were services that the plaintiff had a duty to perform. Thus, in actual fact, all services in connection with the back wages in dispute had not been performed and were not performed prior to the adjudication of bankruptcy. These facts are contained in an affidavit appended hereto and hereby made a part hereof. Since the plaintiff was never given any opportunity to present these facts by the judge before the judge made his finding of fact on the factual issue, said affidavit is required as a part of this Brief.

Thus, the plaintiff did not perform all services in connection with the back wages in dispute prior to the adjudication of bankruptcy.

It is therefore contended that the personal service contract involved was an executory contract. It is further contended that as a personal service executory contract the chose in action for breach of said contract remained with the plaintiff-appellant and did not pass to the trustee in bankruptcy.

performed and everything that was to be done is done." (emphasis added) This is also the Court's holding in Farrington v Tennessee, 95 US 679. 17 CJS 76 likewise states: "An executed contract is one as to which nothing remains to be done by either party."(emphasis added)

Thus, pursuant to the above authorities, if any performance is yet to be done by either party the contract is executory. If there has not been full performance by either party the contract is executory.

Since the plaintiff had not fully performed his duties under the contract prior to the date of his adjudication of bankruptcy, the contract was executory at the time when the plaintiff was adjudicated bankrupt.

The contract was also a personal service contract since it was for the plaintiff's personal teaching ability, skill and talents as a teacher. See In re Miller, 101 F 2d 323 (CCAOhio); Knipe v Barkdull, 35 Cal. Rptr 283 (1963); and Ford Bacon and Davis, Inc. v Holahan, 311 F 2d 901 (CALa.,1962), cert. denied 373 US 913.

The Ford, Bacon and Davis, Inc. case, supra, also states the general rule that the interest of a bankrupt in a contract for personal services which is executory on the date of bankruptcy does not vest in the trustee. See also In re Miller, supra; Knipe v Barkdull, supra; and Collier on Bankruptcy, 14th Edition, Volume 4A, page 300, which follow the same rule of law.

Thus, the contract was an executory contract, and was a personal service executory contract on the date of adjudication of bankruptcy.

The district court judge erred in finding that all services in

connection with the back wages in dispute had been performed prior to the adjudication of bankruptcy and thereby the contract was executed and not executory.

POINT IX

THE DISTRICT COURT JUDGE ERRED IN FINDING THAT THE INJURIES WERE TO PLAINTIFF'S PROPERTY AND NOT PERSONAL INJURIES TO PLAINTIFF.

The judge states on page two (2) of his Ruling that "The question thus presented is whether plaintiff is suing for an injury to his property or rather seeks damages for personal injury which do not vest in the trustee." He then reaches the finding that "it is still clear that the claim passed to the trustee..." There is no explanation or expression of how this finding is arrived at from the statement of the question. There is no explanation of the reasoning process of how this finding is reached. Nor is there any statement of what "property"of plaintiff has been injured.

The question thus presented, as stated by the judge, is a material question of fact, and therefore could not be decided by the judge in the manner in which he decided it, since he had no facts or factual evidence upon which he could decide the question, nor did he ever give plaintiff any opportunity to present evidence.

It is contended that plaintiff sued for personal injuries to himself and not for injury to his property.

The plaintiff sued for injury to his reputation, credit-rating, and financial earning power. His financial earning power was lessened by the filing of the bankruptcy. The filing of the bankruptcy in and of itself,

was an injury to the plaintiff personally.

This position is supported by the case of Gurgein v Howell, 128 SE 644, wherein the Court stated:

> "It is to be observed that the notice expressly avers injury to good name, fame and credit. As to any damage suffered in this regard, the trustee in bankruptcy would not be entitled to recover... In such case the right of action does not pass to the trustee in bankruptcy, but remains with the individual."(emphasis added)

The same principle is also ennunciated by the Court in Clarkness v Katz, 48 F Supp 374 (DCWisc.,1943) when it states:

> "It is a recognized principle in bankruptcy law that the right of redress for wrongs to the bankrupt's person, feelings, or reputation does not belong to his creditors."(emphasis added)

In regard to the injury to plaintiff's financial earning power or capacity, the case of Boudreau v Chesley, 135 F 2d 623(1943) is applicable, since the Circuit Court of Appeals, First Circuit,held that:

> "...creditors are not entitled to share in the distribution of the capitalized value of the bankrupt's future earning capacity. As was said in Local Loan Co. v Hunt, 1934, 292 US 234, 243, 54 S Ct 695, 698, 78 L Ed 1230, 93 ALR 195: (The earning power of an individual is the power to create property; but it is not translated into property within the meaning of the Bankruptcy Act until it has brought into existence.....The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right.)" (emphasis added)

In Sibley v Nason, 196 Mass. 125, 81 NE 887,the Court held that personaltort actions are not "property"and do not pass to the trustee in bankruptcy. The Court stated:

> "This action, having been brought for damages to the person of the plaintiff, could not by any means have been transferred by him. It was not property, nor a right of property until it was reduced to judgment." (emphasis added)

In a particularly relevant case, Asher v Reliance Insurance Co., 308 F Supp 847 (DCCal.,1970) the plaintiff, who had entered into an insurance contract with the defendant insurance company, sued the defendant for fraud in the inducement, alleging that the defendant had committed fraud in inducing the plaintiff to enter into a contract with the defendant. The Court held that the fraud action sounded in tort, and was a personal tort action rather than a contract action or a tort action arising out of a contract.

The Circuit Court of Appeals, Fourth Circuit, in Ruebush v Funk, 63 F 2d 170, 173 likewise stated:

> "Obviously rights of a bankrupt which attach to him personally, such as the ordinary rights incident to his life, liberty, or pursuit of happiness, valuable though they may be, could not be declared to pass to the trustee, because they are neither property or property rights."(emphasis added)

Finally, in In Re Nabors, 280 F 943, 944, the Court points out that even if the right of action for injury to the bankrupt's property arises out of a contract, this does not mean any action for tort resulting in personal injury. The Court said:

> "Rights of action arising upon contract, or from the unlawful taking or detention of or injury to the bankrupt's property pass to the trustee as assets, but this does not include an action for tort resulting in personal injury.." (emphasis added)

On page two (2) of the judge's Ruling the judge states: "whether plaintiff is suing for an injury to his property or rather seeks damages for personal injury..." Obviously, since the judge concludes that the claim passed to the trustee, the judge must have concluded that that plaintiff is suing for an injury to his property. But the judge gives no explanation as to what "property"has been injured. The plaintiff-appellant does not comprehend exactly what "property"of plaintiff's was injured in the judge's opinion. It is contended that the judge erred in this regard since there was no "property" of plaintiff's to be injured. Since plaintiff had no "property"that could be injured, it was impossible to injure plaintiff 's "property" because said "property" did not even exist.

It is also contended that the injuries suffered by the plaintiff were injuries to the person of the plaintiff, personal injuries, and not anything else. The above-cited authorities establish that injuries to a person's reputation, good name, credit, and economic earning power and capacity are personal injuries to the plaintiff's person, and hence any claim based thereon do not pass to the trustee in bankruptcy. These types of injuries are precisely the injuries of which the plaintiff complains. The plaintiff alleges injury to his reputation, good name, credit, and economic earning power or capacity. Thus, the injuries alleged by the plaintiff are indeed personal injuries to his own person. Certainly, a person's reputation is about as personal to that person as anything can possibly be.

Further, said injuries alleged by the plaintiff are injuries to his rights to liberty and the pursuit of happiness, pursuant to the Ruebush case, supra, and pursuant to the Ruebush case, supra, liberty and the pursuit of happiness are not "property or property rights", and the injuries to plaintiff's liberty and pursuit of happiness are personal injuries to the very person of the plaintiff.

It is contended that there was no "property"in existence of plaintiff's that could be injured. It is likewise contended that the injuries suffered by the plaintiff were personal injuries to his very person. Hence, the judge erred in finding that the injuries were to plaintiff's property and not personal injuries to plaintiff.

POINT X

THE DISTRICT COURT JUDGE ERRED IN FINDING THAT THE CAUSES OF ACTION FOR FRAUD AND NEGLIGENCE AROSE OUT OF A CONTRACT.

It is contended that the causes of action did not come into existence prior to the date, June 11, 1976, when the plaintiff filed bankruptcy. Rather said causes of action only came into existence at the moment when the plaintiff filed bankruptcy. Thus, the causes of action arose after the teaching contract had already been breached.

Further, it is contended that the causes of action arose out of acts of fraud and negligence that occurred after the contract was already breached. The acts of fraud and negligence were committed by the defendant after the contract had already been breached and the first injury suffered by the plaintiff was the filing of the bankruptcy itself. Thus, the wrong-

ful acts were committed completely after the contract had been breached and the injuries first occurred on June 11, 1977 when the plaintiff filed bankruptcy. Accordingly, the causes of action for fraud and negligence did not arise out of any contract, but arose solely out of wrongful acts occurring after the teaching contract was already breached, and the injuries beginning with the filing of bankruptcy on June 11, 1976.

The judge makes the determination that the causes of action arose out of the contract.

First, this constitutes a determination of a material question of fact since the question of whether the causes of action, for fraud and negligence arose out of the teaching contract is a material question of fact. The judge therefore erred in making a finding on this issue since no facts or factual evidence had been admitted nor had the plaintiff had any notice or opportunity to present materials indicating that the issue was a material question of fact.

Second, in order to determine whether the causes of action for fraud and negligence arose out of the teaching contract the judge had to determine when, in point of time, the causes of action for fraud and negligence came into existence. This issue is likewise another material question of fact that the judge erred in determining. See Burns Bros. v The Central Railroad of New Jersey, 202 F 2d 910 (CANY,1953); S.C. Loveland, Inc. v Eastwest Towing, 415 F Supp 607 (1976); Wolfe v Selective Service Board No. 16, 372 F 2d 817 (CANY,1967); and City of Waterbury v H.L.Yolt Co., 253 F Supp 778 (DCConn, 1966).

Further, to determine the above-mentioned issues one must follow the law as to when a cause of action for fraud or negligence comes into existence.

Thus, the question presented is when, by the law, does a cause of action for fraud come into existence? It is the well established rule that a cause of action for fraud comes into existence at the moment when the injury actually occurs. Thus, until the actual injury occurs there is no cause of action for fraud even though the act of fraud may have been already committed. Actual injury must first occur before a cause of action for fraud comes into being.

Cases establishing the above rule that a cause of action for fraud only comes into being when the actual injury has occurred are Bender v New Zealand Bank and Trust Co., 67 F.R.D. 638 (DCNY,1974); Jones Memorial Trust v Tsai Services, Inc., 367 F. Supp. 491 (DCNY, 1973); and Spindel v Spindel, 283 F Supp 797 (DCNY, 1968).

Further, the question presented is when by the law, does a cause of action for negligence come into existence? The well established rule is that a cause of action for negligence comes into existence at the moment actual injury occurs. Thus, a cause of action for negligence does not exist, even though the act of negligence has occurred, until an actual injury has occurred. See Quinones v United States, 492 F 2d 1269 (CAPa.1974).

The fraud occurred after the contract was already breached. The negligence occurred after the contract was already breached. But even more importantly, the actual injury to the plaintiff occurred at the moment he filed bankruptcy due to being forced to do so directly by the defendant's

fraud and negligence. The filing of the bankruptcy itself was an injury in itself to the plaintiff. The other injuries then suffered by the plaintiff were injury to his reputation, good name, credit and future financial earning power or capacity, physical and mental pain and suffering.

Pursuant to the above authorities, since the injuries didn't occur until the moment when the plaintiff filed bankruptcy, the causes of action for fraud and negligence first came into existence at the time when plaintiff filed bankruptcy. Thus, the causes of action only came into existence on June 11, 1976, long after the teaching contract had been breached. Hence the causes of action for fraud and negligence did not arise out of any contract whatsoever.

Further,, the causes of action for fraud and negligence actually, by law, did not come into existence until after the plaintiff had filed bankruptcy on June 11, 1976. The rule of law is established that where the cause of action comes into existence by the actual injury being the bankruptcy itself, which occurrs on the date of filing of the bankruptcy, the cause of action is held to have come into existence after the date of filing of the bankruptcy. In the case of Reichart v General Insurance Co. of America, 428 P 2d 693 (1967) in which very similar facts existed as in the case-at-bar, the Court held that a claim for damages caused by the bankruptcy itself arises after the cleavage date and thus does not vest in the trustee. The Court clearly held that a trustee does not succeed to a bankrupt's action for damages caused by bankruptcy. The

Court said that though these damages may stem from a wrong perpetrated before bankruptcy, the damages are not suffered nor is the claim vested until the bankruptcy petition is filed.

A basic rule of bankruptcy law is that the trustee in bankruptcy only acquires property belonging to the bankrupt at the time the petition for bankruptcy is filed. Property acquired by the bankrupt after the Petition is filed becomes the bankrupt's and does not pass to the trustee. Since the causes of action for fraud and negligence did not come into existence prior to the filing of the plaintiff's petition for bankruptcy, it is contended that even assuming for the sake of argument alone, without any admission thereto, that the causes of action for fraud and negligence were "property", they did not pass to the trustee, but belong to the plaintiff as the bankrupt. This rule of law and contention is clearly supported by Collier on Bankruptcy, 14th Edition, Volume 4A, pages 103-106; Bank of Elberton v Swift, 268 F 30 (CCA,5th Cir.); Everett v Judson, 228 US 474; Matter of Morris and Rice, 258 F 712 (DCMass.).

Further, in Asher v Reliance Insurance Co., 308 F Supp 847 (DCCal,1970) the plaintiff, who was the insured, sued the defendant insurance company, for fraud in the inducement, alleging that the defendant had fraudulantly induced him into entering into an insurance contract with the defendant. The Court held that the insured-plaintiff's action for fraud in the inducement of a contract sounded in tort and did not arise out of contract.

It should also be noted that the phrase "arising out of a contract" has been held to have a far different meaning than the words "arising

out of transaction"or "connected with subject of action". This was the holding in United States Hoffman Machinery Corporation v Ebenstein, 96 P 2d 661, 662, 150 Kan. 790.

Hence, the causes of action for fraud and negligence could arise out of a transaction and yet not arise out of a contract.

Thus, the causes of action for fraud and negligence did not arise until after the date the plaintiff filed bankruptcy, long after any teaching contract had already been breached and long after any teaching contract had been terminated. This being so, the causes of action for fraud and negligence did not pass to the trustee in bankruptcy but remained with the plaintiff. The causes of action for fraud and negligence did not arise out of any contract. The judge erred in finding otherwise.

CONCLUSION

In essence, the defendant-appellee's argument is that he can commit fraud and negligence, thereby forcing plaintiff-appellant into bankruptcy, injuring him, but the plaintiff-appellant cannot now sue him for doing so because plaintiff is now bankrupt due to defendant's fraud and negligence.

It is submitted that the above argument by defendant is false and results in substantial injustice to the plaintiff. It ignores the fact that the filing of the bankruptcy is, in and of itself, an injury to the plaintiff by the defendant.

It is well established that a court should deny a motion to dismiss, except only in rare instances. The basic rule of law is that a motion to dismiss will not be granted unless it appears to a certainty that the plaintiff

is entitled to no relief under any state of facts which could be proved in support of the claim. This rule is stated in the case of Conley v Gibson, 355 US 41 (1957) wherein the United States Supreme Court stated:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In a more recent opinion the United States Supreme Court, in regard to motions to dismiss held:

> "Consequently, the motion will not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." Haines v Kerner, 404 US 519 (1972). See also Pollack v Crandell, 196 F Supp 253 (DCNY 1961).

The case-at-bar raises many material issues and questions, including many serious, genuine issues of fact. It contains material questions of fact and also questions of law. But even the questions of law could only be determined by first determining material questions of fact and then basing the determination of the question of law on the prior determination of the material question of fact. It is contended that there was a reasonable possibility that the plaintiff-appellant could have proved a state of facts which would have entitled him to relief, and therefore, pursuant to the rule in Conley v Gibson, supra, Haines v Kerner, supra, and the other cases, the plaintiff-appellant's complaint should not have been dismissed. The judge erred in doing so.

THE JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE SHOULD BE REVERSED AND THE COMPLAINT REINSTATED.

Respectfully submitted,

By: Terence J. Moore

Terence J. Moore, Esq., Pro Se
7105 Wilson Lane
Bethesda, Maryland 20034

AFFIDAVIT

Terence J. Moore, upon first being duly sworn under oath, states:

1. That I filed a voluntary petition for bankruptcy in the Bankruptcy Court, Hartford, Connecticut on June 11, 1976, which was given bankruptcy number H76-624.

2. That at the first hearing, presided over by Judge Saul Seidman, on July 6, 1976 I testified under oath, in the presence of numerous witnesses, that I had a claim for unpaid back salary for $10,905.00 against Wethersfield School of Law, Inc. Said testimony was recorded by the court reporter.

3. That on July 21, 1976, I and my wife, Cherie D. Moore, filed an amendment to our bankruptcy petitions to state, "I had a claim against Wethersfield School of Law, Inc. for $10,905.00 in unpaid salary," and amended Summary of Debts and Property - B-2/q to state that $10,905.00 was due from Wethersfield

2.

School of Law, Inc. A true and correct copy of said amendments filed is appended hereto and hereby made a part hereof.

Terence J. Moore

Terence J. Moore
Plaintiff-Appelle

Subscribed and sworn to before me this 11th day of May, A.D., 1977.

NOTARY PUBLIC

My Commission Expires May 30, 1980

AFFIDAVIT

Terence J. Moore, upon first being duly sworn under oath, states:

1. That he gave final examinations to students in his courses in Property and Political and Civil Rights at Wethersfield School of Law, Inc. during the Spring Semester, 1976.

2. That the giving of said final examinations to said students, the reading and grading of said final examinations, and the turning in of the final grades on said final examinations were his duties to perform.

3. That said final examinations were not read or graded by me prior to June 11, 1976; that I never turned in any final grades on said final examinations to anyone prior to June 11, 1976, and have never yet turned in any said grades; that reading and grading said final examinations and then turning in said grades to Wethersfield School of Law, Inc. were duties of performance I had, but I had never yet performed then, and certainly did not perform prior to June 11, 1976 when I was adjudicated bankrupt.

PLAINTIFF-APPELLANT

Terence J. Moore

Subscribed and sworn to under oath before me this 11th day of May, 1977.

Notary Public

My Commission Expires May 30, 1980

DISTRICT OF CONNECTICUT

BANKRUPTCY COURT

IN RE: TERENCE J. MOORE and CHERIE D. MOORE) BANKRUPTCY NO. H76-624

AMENDMENTS TO BANKRUPTCY PETITIONS

I, Terence J. Moore, and I, Cherie D. Moore, do hereby amend our bankruptcy petitions by amending Schedule B-2 - PERSONAL PROPERTY, question "q" from saying "None" to state: "claim against Wethersfield School of Law, Inc. and its affiliated corporations for $10,905.00 in unpaid salary"; and further by amending Summary of Debts and Property -B-2/q to state "$10,905.00 due from Wethersfield School of Law, Inc. and its affiliated corporations."

Terrence J. Moore
Terence J. Moore

Cherie D. Moore
Cherie D. Moore

Subscribed and Sworn to before me this 21st day of July, A.D., 1976.

NOTARY PUBLIC
KENNETH R. KIELLEN
NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 31, 1981

RECEIVED
JUL 21 1976
SAUL SEIDMAN
BANKRUPTCY JUDGE

APPROVED
Saul Seidman
Bankruptcy Judge
By: Chief Clerk

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COMPLAINT

(filed July 21, 1976)

COUNT I

FOR FRAUD

1. Plaintiff is a citizen of the State of Connecticut and defendant is a citizen of the State of New Jersey. The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars ($10,000).

2. The defendant was the acting President, and was and is the President, Treasurer, and Bursar of Wethersfield School of Law, Inc., an alleged nonstock, nonprofit corporation, incorporated in the State of Connecticut.

3. The plaintiff had been employed by said Wethersfield School of Law, Inc. during the years 1974 and 1975 as a full-time associate professor of law at a salary of $22,500 per year, by written contract, that the plaintiff, pursuant to said contract, was to be provided with health and medical insurance for himself and his family, to be paid for by said Wethersfield School of Law, Inc.

4. Said Wethersfield School of Law, Inc. failed to pay any salary to the plaintiff beginning on April 1, 1975 and had also ceased providing the aforesaid insurance benefits to the plaintiff and his family.

5. In September, 1975 and repeatedly thereafter the defendant, as Acting President or President of Wethersfield School of Law, Inc. falsely, fraudulently, and with intent to defraud the plaintiff

represented to the plaintiff that all full-time faculty members, including the plaintiff, the defendant as Acting President or President, and the Dean were being and would be paid exactly the same equal salaries by Wethersfield School of Law, Inc.; that the plaintiff would begin receiving payment of due and owing back unpaid salary; that health and medical insurance benefits and coverage would be provided for the plaintiff and his family; that the defendant made said representations maliciously and without reasonable and probable cause.

6. Those representations were false in fact and known to be false or should have been known to be false by the defendant at the time they were so made, and in truth and in fact the defendant, as Acting President or President, and the Dean were making and do make significantly higher salaries than the plaintiff and the other full-time faculty members; that the plaintiff did not receive any payments of due and owing back unpaid salary; that health and medical insurance benefits and coverage was not provided for the plaintiff and his family.

7. Plaintiff relied upon the representations and was thereby induced to close and terminate his private law practice and take the position of associate professor of law at said Wethersfield School of Law, Inc., thereby causing the plaintiff loss of income, great financial expenses, financial hardship and loss, a lack of health and medical insurance coverage for himself and his family, physical and mental pain and suffering, great emotional distress, and loss of

reputation.

8. In January and February, 1976 the defendant falsely and fraudulently, and with intent to defraud the plaintiff, repeatedly expressly represented to the plaintiff that the plaintiff should make a settlement with said Wethersfield School of Law, Inc. as to the back unpaid salary due to the plaintiff by said Wethersfield School of Law, Inc., since the Connecticut Commission on Higher Education was going to inspect and evaluate within a few weeks said Wethersfield School of Law, Inc. for purposes of whether said School should receive a license to operate and that the plaintiff should sign an agreement deferring payment of all unpaid back salary due and owing to a date five (5) years from the date of said agreement so as to reduce the immediate financial liability of said School by the time when the Connecticut Commission on Higher Education was to inspect and evaluate said School within a few weeks; that the defendant made said representations maliciously and without reasonable and probable cause.

9. Those representations were false in fact and known to be false or should have been known to be false by the defendant at the times they were so made, and in truth and in fact at that time the defendant was being subjected to substantial pressure and demands by the State of Connecticut Department of Labor and others to have said Wethersfield School of Law, Inc. make an arrangement with the plaintiff to pay the plaintiff his back, unpaid salary within a short time; that in truth

and in fact the Connecticut Commission of Higher Education was not scheduled to inspect and evaluate whatsoever said Wethersfield School of Law, Inc. within a few weeks or at any later time, and said Commission never did and never has inspected and evaluated said School since January, 1976.

10. Plaintiff relied upon said representations by the defendant and was thereby induced to sign an agreement with said Wethersfield School of Law, Inc. deferring payment of all back unpaid salary due to plaintiff to five (5) years from the date of the agreement, thereby causing the plaintiff loss of income, great financial hardship and loss, including, but not limited to, a complete loss of credit, the lowest credit rating, a lack of health and medical insurance coverage for himself and his family, physical and mental pain and suffering, great emotional distress, and loss of reputation.

11. From September, 1975, through June, 1976, and to the present time the defendant falsely and fraudulently and with intent to defraud the plaintiff repeatedly represented to the plaintiff that all monies and funds of said Wethersfield School of Law, Inc. that had been spent and were being spent, had been spent and were being properly and lawfully spent for purposes of said School, and that no funds or monies of said School had been or were being misappropriated or were missing or unaccounted for; that the defendant made said representations maliciously and without reasonable and probable cause.

12. Those said representations were false in fact and known to be false or should have been known to be false by the defendant at the times they were so made, and in truth and in fact there was and is improper, unlawful misappropriation and spending of funds and monies of said School, in various manners, including, but not limited to the following acts: (a) there was and still is approximately $34,000 missing and unaccounted for from the said School's funds, which the defendant, as Acting President or President, Treasurer and Bursar of said School has had knowledge of or should have had knowledge of since September, 1975; (b) the defendant has and does use funds and monies of said School to pay for conducting his own personal affairs and his own private business affairs.

13. Plaintiff, as a significant creditor of said School relied upon said representations by defendant, as President of said School, and was thereby induced to not pursue any claim against said Wethersfield School of Law, Inc. for unpaid back salary due and owing to the plaintiff, or any other claims for benefits, and thereby causing the plaintiff loss of income, great financial hardship and loss, including, but not limited to, a complete loss of credit, the lowest credit rating, a lack of health and medical insurance coverage for himself and his family, physical and mental pain and suffering, great emotional distress, and loss of reputation.

14. That the defendant falsely and maliciously and without reason-

able and probable cause made all of the aforesaid representations to the plaintiff; that defendant has and does bear intentional malice against the plaintiff.

15. By reason of the premises and the aforesaid plaintiff has suffered damages in the sum of one-hundred-fifty-thousand dollars ($150,000.00)

Wherefore, the plaintiff demands judgment against defendant for the following: (1) damages in the sum of $150,000.00; (2) punitive damages in the sum of five-hundred-thousand dollars ($500,000.00); (3) costs and attorneys'fees; (4) any other relief that the Court may deem just and proper.

COUNT II

NEGLIGENCE

1. Plaintiff is a citizen of the State of Connecticut and defendant is a citizen of the State of New Jersey. The matter in controversy exceeds, exclusive of interests and costs, the sum of ten-thousand dollars ($10,000.00).

2. The defendant was the Acting President, Treasurer and was and is the President, Treasurer, and Bursar of Wethersfield School of Law, Inc., an alleged nonstock, nonprofit corporation, incorporated in the State of Connecticut.

3. The plaintiff is a substantial creditor of said Wethersfield School of Law, Inc. and also was and is an associate professor of law at said School.

4. That from September, 1975, through June, 1976 and to the present time the defendant as Acting President, President, Treasurer,and Bursar of said Wethersfield School of Law, Inc. acted negligently in performing his duties and functions at said School and by failing and neglecting to perform said duties and functions.

5. That from September, 1975 through June, 1976 and to the present time the defendant, as Acting President, President, Treasurer, and Bursar of said Wethersfield School of Law, Inc. acted recklessly, with gross negligence and wanton misconduct in performing his duties and functions at said School and by failing and neglecting to perform said duties and functions.

6. Said negligence, or recklessness, gross negligence and wanton misconduct included, but was not limited to, the following acts or failures to act: (A) failure to act upon having knowledge, or should have had knowledge of approximately thirty-four thousand dollars ($34,000.00) being missing and unaccounted for from the monies and funds of said Wethersfield School of Law, Inc.: (B) expenditures of said School's funds and monies for his own personal use, purposes, and benefit; (C) neglecting to perform his duties and functions as President, Treasurer, and Bursar competently or with responsibility, and by acting irresponsibly, recklessly, and improperly.

7. Said negligence, or recklessness, gross negligence, and wanton misconduct by the defendant was and is the proximate cause of injuries to the plaintiff, and as a result the plaintiff was injured by loss of income, great financial expenses, financial hardship and losses, a

DEFENDANT'S MOTION FOR DISMISSAL OF ACTION AND DEFAULT

lack of health and medical insurance coverage and benefits for himself and his family, physical and mental pain and suffering, great emotional distress, and loss of reputation.

8. By reason of the premises and the aforesaid plaintiff has suffered damages in the sum of one-hundred-fifty-thousand dollars ($150,000.00).

Wherefore, the plaintiff demands judgment against defendant for the following: (1) damages in the sum of one-hundred-fifty-thousand dollars ($150,000.00); (2) punitive damages in the sum of five-hundred-thousand dollars ($500,000.00); (3) costs and attorneys'fees: (4) any other relief that the Court may deem just and proper.

Terence J. Moore
PLAINTIFF

DEFENDANT'S MOTION FOR DISMISSAL OF ACTION AND DEFAULT

The defendant in the above entitled action moves, pursuant to Rule 12 (b)(6) that the action and the default entered thereon be dismissed for the following reasons:

1. The plaintiff, prior to bringing suit, was adjudicated bankrupt before the Honorable Saul Seidman on or about June 11, 1976.

2. The schedules filed by the plaintiff as bankrupt did not list for exemption the claimed cause of action pursuant to 11 U.S.C.A. §11(11) and 11 U.S.C.A. §§ 24 and 25.

3. A trustee in bankruptcy has been appointed and is the only proper person to bring this action.

BRIEF IN SUPPORT OF MOTION FOR DISMISSAL OF ACTION AND DEFAULT

Wherefore, the defendant respectfully moves for a dismissal of said cause of action.

DEFENDANT

By
William R. Moller
Attorney for
Anthony M Slonim

BRIEF IN SUPPORT OF MOTION FOR DISMISSAL OF ACTION AND DEFAULT

11 U.S. Code Annotated § 11(11) sets forth that the Bankruptcy Court shall determine all claims of bankrupts to their exemption. It has been consistently held that a Bankruptcy Court always has jurisdiction to determine merits of bankrupt's claim to exemptions. In re Rogers, D.C. N.Y. (1943), 51 F. Supp. 930. Such an attack cannot be made collaterally. Goldsmith v M. Jackman & Sons, Inc., (C.A. Okl.1964) 327 F. 2d 184; Bush v Shepherd, (1949) 205 P.2d 842.

The records in the above case discloses that no exemption was granted under the schedules and that the present action should be dismissed since present jurisdiction is exclusively before the Honorable Saul Seidman.

Respectfully submitted,

By

William R. Moller
Attorney for defendant
Anthony M. Slonim

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

TERENCE J. MOORE :

v : CIVIL NO. H-76-283

ANTHONY M. SLONIM :

RULING ON MOTION TO DISMISS

Plaintiff is a former professor at the Wethersfield School of Law. He filed for and was adjudicated a bankrupt on June 11, 1976. Plaintiff now brings this diversity action against the Acting President of the school alleging that as a result of defendant's misrepresentation and negligence, plaintiff was induced to execute a contract deferring payment of certain back wages for a period of five years. He claims damages for loss of income, insurance, credit rating, and reputation. Defendant moves to dismiss and contends that only plaintiff's trustee in bankruptcy may maintain this suit. 1/

Section 70(a) of the Bankruptcy Act, 11 U.S.C. § 110 (a) provides in pertinent part:

> "The trustee of the estate of a bankrupt . . . shall . . .be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition. . . to all of the following kinds of property wherever located . . .(6) rights of action arising upon contracts, or usury, or the lawful taking or detention of or injury to his property."

1/ It is undisputed that plaintiff did not list the instant claim in his schedule of assets when filing for bankruptcy.

RULING ON MOTION TO DISMISS

The question thus presented is whether plaintiff is suing for an injury to his property or rather seeks damages for personal injury which do not vest in the trustee. The defendant is alleged to have committed a business tort. Plaintiff had a claim against the school for moneys due and owing. Because of defendant's fraud or negligence, plaintiff was deprived of prompt payment of that debt. Construing plaintiff's complaint liberally as setting forth an action in deceit, it is still clear that the claim passed to the trustee and that plaintiff cannot bring such an action in this court.

Rights based upon fraudulent misrepresentation or deceit through which the bankrupt incurred lossess are injuries to his property and accrue to the benefit of his creditors. Hermsmeyer v A.L.D., Inc., 239 F. Supp. 740, 742-43 (D. Colo. 1964); 4A Collier on Bankruptcy ¶ 70.28 at 412-412.1 (14 ed.1976). Plaintiff in effect alleges that because of defendant's deceit, he did not have the use of money owing him. But as the court noted in In re Gay, 182 F. 260 (D.Mass.1910), such money would "otherwise have been available to meet [his] obligations," and so should vest in the trustee. See also, In re Harper, 175 F. 412 (S.D.N.Y. 1910). Actions for fraud and misrepresentation on a contract have been consistently held to accrue in favor of the bankrupt's estate. See, e.g., Gochenour v. Cleveland Terminals Bldg. Co., 118 F. 2d 89 (6th Cir. 1941); Tamm v Ford Motor Co., 80 F.2d 723 (8th Cir. 1935); Patton v. Fidelity-Philadelhpia Trust Co., 246 F. Supp. 1015 (E.D.Pa.1965); Hermsmeyer v. A.L.D., Inc., supra. This case is not unlike Constant v.

Kulukundis, 125 F. Supp. 305 (S.D.N.Y.1954), in which Judge Edelstein held that plaintiff's claim that "defendants entered into a conspiracy 'to defraud and ruin'plaintiff and to obtain control of all assets (of certain corporations)"vested in plaintiff's trustee in bankruptcy. I am persuaded by the reasoning of the above cases and so conclude that Moore is not the proper party to bring this action.[2/]

Plaintiff alleges also, though, that because of defendant's fraud he sustained a loss of reputation and pain and suffering personal to him. Whatever aspersion the allegation of deceit may cast on the defendant, the mere fact that plaintiff was misled or deceived resulted in no injury to his own reputation. The situation here is very different from that in Boudreau v. Chelsey, 135 F. 2d 623 (1st Cir. 1943), where defendants interfered with plaintiff's ability to earn a living as a banker by spreading false rumors to the Comptroller of the Currency and others as to the plaintiff's incompetence, dishonesty, and criminal tendencies. Moore was not slandered by the defendant. He is not precluded from pursuing a career as an attorney or a law professor simply because he was deceived into not pressing a cause of action against the Wethersfield School of Law. In addition, it is black letter law that damages for mental distress are not ordinarily available in a cause of action for a business fraud. 37 C.J.S. Fraud [[141 (f) at 469.

2/ Since all services in connection with the back wages in dispute had been performed prior to the adjudication of bankruptcy, plaintiff's citation of cases dealing with executory personal service contracts is inapposite.

RULING ON MOTION TO DISMISS

The complaint should not be dismissed, of course, unless "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v Gibson, 355 U.S. 41, 45-46 (1957). Construing the complaint with great expansiveness, plaintiff seems to contend that as a result of the fraud, he was forced to file for bankruptcy; because of his bankruptcy, his reputation and credit rating have been injured.[3/] This inferential chain is unfortunately flawed. First, in an action for fraud, damages are limited to either the out of the pocket loss or the loss of the bargain promised plus any consequential damages which are the direct result of the fraudulent misrepresentations. Franchey v. Hannes, 155 Conn. 663 (1967). The injury to plaintiff's reputation here seems extremely remote from the underlying fraud.

More important, as a matter of law and logic, the fraud or negligence here could not have been a proximate cause of the plaintiff's injuries. When he filed for bankruptcy in June 1976, plaintiff possessed a cause of action against the defendant. This cause of action might be expressed as either a contractual claim for back wages and recission of the prior deferment or as a suit in fraud. In either case, the chose in action was property of the estate. Plaintiff, however, voluntarily chose not to list this claim as an asset. He is foreclosed by his own actions from arguing that the inclusion of the claim against the defendant when added

3/ At least one court has held that plaintiff is precluded from prosecuting an action for such consequential injuries when the underlying claim is vested in the trustee. Patton v. Fidelity-Philadelphia Trust Co., supra. See also Reichert v. General Insurance Co. of America, 442 P.2d 377 (Cal.1968). But cf. Wooten v. Central Mutual Insurance Co., 182 S. 2d 146 (la.App.1966).

to his other assets would have rendered him solvent. If, on the other hand, plaintiff's debts would have exceeded his assets even with the addition of the claim for back wages, then the defendant's deceit is not even a but for cause of plaintiff's subsequent losses.

Finally, plaintiff contends that he is entitled to bring this action because the trustee has abandoned the claim, and it has reverted back to the bankrupt. Plaintiff was adjudicated a bankrupt June 11, 1976. He brought this suit on July 21, 1976. Because plaintiff did not list this chose in action as an asset of his estate, he cannot now claim an abandonment by the trustee. Hermsmeyer v. A.L.D., Inc., supra 239 F. Supp. at 741. The doctrine of abandonment applies only where the trustee knows of the existence of the property. When the bankrupt fails to list the asset, he denies the trustee an opportunity to pursue the claim. As the Supreme Court pointed out in First National Bank v. Lasater, 196 U.S. 115, 119 (1905):

> "It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee has never taken any action in respect to it. If the claim was of value. . . it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property."

Plaintiff's claim of abandonment is therefore premature.

The default previously entered against the defendant shall be set aside. Defendant's Motion to Dismiss is granted.

JUDGMENT

SO ORDERED

Dated at Hartford, Connecticut, this 10th day of February, 1977.

M. Joseph Blumenfeld
United State District Judge

JUDGMENT

The above-identified action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge, of the Defendant's Motion to Dismiss; and,

The Court, after consideration of all the papers submitted in connection therewith, having filed a Ruling on the aforesaid Motion to Dismiss, dismissing the Plaintiff's Complaint;

It is accordingly ORDERED and ADJUDGED that the Plaintiff's Complaint be and is hereby dismissed.

Dated at Hartford, Connecticut, this 11th day of February, 1977.

Sylvester A. Markowski

Clerk, United States District Court

By: William A. Templeton
Deputy-in-Charge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

TERENCE J. MOORE, Plaintiff-Appellant	)	
V	)	Docket No. 77-7127
Anthony M. Slonim, Defendant-Appellee	)	

AFFIDAVIT OF SERVICE

Terence J. Moore, upon first being duly sworn under oath, states:

1. That he is the plaintiff-appellant in Terence J. Moore v. Anthony M. Slonim, Docket No. 77-7127, in the United States Court of Appeals, Second Cirucit.

2. That he is representing himself, Pro Se.

3. That he duly mailed, postage prepaid, by the United States mails, two copies of the appellant's brief and appendix to William R. Moller, Moller and Horton, Attorneys at Law, 87 Oak Street, Hartford, Connecticut 06106, on May 13, 1977.

4. That said law firm of Moller and Horton are the attorneys for the defendant-apppellee, Anthony M. Slonim.

Terence J. Moore

Terence J. Moore, Esq. Pro Se
7105 Wilson Lane
Bethesda, Maryland 20034

Subscribed and sworn to before me this 13th day of May, A.D., 1977.

Notary Public
My Commission Expires May 30, 1980